EMPLOYMENT TRIBUNALS

Claimant: Mrs L Webber
Respondent: Age UK Knaresborough and District

HELD AT: Leeds **ON:** 22 to 23 June 2017

BEFORE: Employment Judge J M Wade

REPRESENTATION:

Claimant: Mr D Flood, counsel
Respondent: Mr D Robinson-Young

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 23 June 217, the written record of which was sent to the parties on 26 June 2017. A written request for written reasons was received from the respondent on 27 June 2017. The volume of typing and typing resources is such that the draft transcript was provided to me on the afternoon of 28 July 2017. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. The draft has been corrected for sense, expression, undisputed matters, and relevant law which was not announced to the parties. For convenience the terms of the Judgment given on 23 June 2017 are repeated below:

1 The claimant's unfair dismissal complaint is well founded and succeeds.
2 The claimant's wrongful dismissal complaint is dismissed.
3 The Tribunal makes the following awards:

Basic Award:	£2346
Compensatory Award (including 20% ACAS uplift):	£2349.43
Total:	£4695.43

4 The respondent shall further reimburse to the claimant £1200 in Tribunal fees.

5 The recoupment regulations do not apply to the Awards above.

REASONS

Introduction and issues

1. This was the hearing of the claimant's complaints of unfair and wrongful dismissal in the context of her work as an employee of a charity which provides support for the elderly and vulnerable. The respondent's counsel had prepared a written list of issues, which was subject to some factual modification; the general issues to which both experienced counsel spoke are well known to the Tribunal. They differ greatly as between the two complaints.
2. With regards to the wrongful dismissal complaint: did the claimant engage in conduct calculated or likely, without reasonable and proper cause, to destroy or seriously damage the necessary trust and confidence between employer and employee (and an implied term of the contract of employment?)
3. As to unfair dismissal: what was the principal reason for the claimant's dismissal? The respondent relied upon her conduct. Did the respondent act reasonably in treating that reason as sufficient reason to dismiss the claimant in all the circumstances of the case? That includes whether Mr Lawton had a genuine belief, based on reasonable grounds, after such investigation as was reasonable, that the claimant had engaged in the misconduct in question. Did he act within the band of reasonable responses of a reasonable employer in dismissing?
4. Remedy issues were discussed by the representatives in their submissions and further below.

Evidence

5. I have heard evidence from the respondent's witnesses: Mr Lawton a trustee and retired solicitor, Mr Terry the claimant's line manager, and Mrs Farqurson, who is the Chief Executive Officer ("CEO").
6. On behalf of the claimant I have heard from herself and from Ms Tonge. I also had a statement from Mr Tedeschi, which was in the form of a character witness for the claimant, who did not attend but its contents were not challenged. His mother had been cared for, and visited by the claimant, when she had worked for the respondent. That written statement was entirely supportive of the claimant and her motives in carrying out care for his mother and was explicit as to the fact that she could have no financial motive for doing so.

Findings of Fact

I have made summary findings of fact as follows.

7. The claimant initially worked as a volunteer for the respondent charity from 6 January 2012. She then commenced employment in May of 2012. She was supervised and managed by Mr Terry and her duties were co-ordinating the day care and shopping activities carried out for the elderly by volunteered and paid staff.

8. In 2014 a matter arose in relation to a client of the respondent, whom the claimant was proposing to take for a hair cut in her own time at a weekend. There was a text exchange about that in which Mr Terry pointed out that activity as problematic for a number of reasons.

9. The short point is that there are, in this sector, professional boundaries that require to be observed, which include not engaging with clients in one's own time, but particularly not engaging with them in activities for which the respondent is neither contracted nor insured. In any event that conversation was had and the matter was forgotten about.

10. The claimant in the meantime had befriended a couple, Mr and Mrs A known to her through her work, with whom she became very close. She regularly visited them in her own time and had introduced them to her family members.

11. It was not in dispute that the claimant signed and new contract of employment in 2016 and that it referred to the respondent's disciplinary procedure which contained typical provisions as to types of misconduct and gross misconduct, suspension to allow investigation, hearings and appeals; hearings and decisions were said to lie with the chief executive officer and appeals with the trustees.

12. In June of 2016 there were discussions with Mr A about his mobility difficulties in accessing the bank and the claimant became a signatory on a savings account on 2 July 2016 in order to assist him should the need arise in the future.

13. The claimant was so involved in supporting Mr and Mrs A that she had concerns about Mr A's health, and had composed a letter to his GP which she took into work or sent into work by email. She had started composing that on or around 18 July 2016.

14. Mr and Mrs A had friends, Mr and Mrs B, who on visiting became concerned about the claimant's involvement and complained to the contracted care giving organisation. That third party raised a concern about the claimant becoming a signatory on Mr A's bank account, which was escalated to the safeguarding lead at the local authority.

15. The matter had been raised directly with the claimant by Mr and Mrs B on the weekend preceding 26 July, around 23 July. At that stage the claimant e rang the bank and asked to be removed as a signatory.

16. In effect she had been accused by Mr and Mrs B of the financial grooming of Mr and Mrs A, and she was very concerned about that. She then confirmed that request to be removed to the bank in a letter.

17. Immediately upon these matters being raised with the respondent, the allegations were discussed with the claimant by Mrs Farqurson. In particular, there was a discussion about the financial allegation and whether or not the claimant was a signatory on any account of Mr and Mrs A. The claimant's response to that discussion was to be economical with the truth about it: she gave a straight "no" answer, which Mrs Farqurson took absolutely on trust, such that she subsequently wrote to the local authority safeguarding lead for these matters robustly defending the claimant's reputation.

18. As matters then transpired evidence came to light of course, from the bank and other sources, to confirm that the claimant had been made a signatory in June,

albeit she had sought to be removed when the complaint was raised directly with her at Mr and Mrs A's house by Mr and Mrs B.

19. After the initial meeting with Mrs Farqurson on 26 July the claimant was very angry and upset. She sent an intemperate and ill advised text to Mr and Mrs B and that, unsurprisingly, was drawn to the attention of the safeguarding lead at the local authority.

20. By 8 August 2016, when these matters were being discussed within the local authority with Mrs Farqurson present, concerns were escalating as to the claimant's activity and motives in regard to Mr and Mrs A.

21. On 15 August 2016 the claimant was suspended by the respondent. She was invited to a disciplinary hearing to take place on 30 August with Mrs Farqurson. She then raised the imminent disciplinary hearing with the local authority, and, having been advised that disciplinary proceedings should not take place until the local authority investigation was complete, the meeting was postponed. There was a further safeguarding meeting, which included the respondent and the local authority, on 9 September, for which an interim report had been available on 2 September.

22. These events meant that the claimant had two invitations to disciplinary hearings with Mrs Farqurson. One described five disciplinary charges, and the second three charges. The claimant set out her response to each charge in writing by way of "track change" inserts into the electronic versions of those invitation letters.

23. On 13 September 2016 the local authority confirmed to the claimant as follows: "I can confirm that the safeguarding investigation is now complete. On the basis of the findings I have had to conclude that the allegation of financial abuse can be partially substantiated. This is around you receiving money from [Mr and Mrs A] and this was deemed as inappropriate given you meeting them in a professional capacity. Concerns were also around you accepting to becoming a signatory on their bank account – which given they are very vulnerable I feel it placed both parties at risk. I understand you accept that you acted out of your professional boundaries and will take this into account in future."

24. The allegation of receiving money related to a £200 gift given to the claimant by Mr A and recorded in the couples' cheque book. There were later amendments to the local authority report at the claimant's request but the essential finding of "financial abuse partially upheld" did not change.

25. The claimant attended a disciplinary meeting with Ms Tonge and Mrs Farquarson present on the 14 September. That consisted of Mrs Farqurson simply reading out the three latter charges (one of which was the gift receipt) and the claimant reading out her responses. The charges and responses were discussed professionally, and the claimant was told that she would have a disciplinary outcome within a week or so.

26. A disciplinary outcome was not given by Mrs Farquarson. The updated report from the local authority safeguarding team finally arrived with the respondent on or about 21 September, and that gave rise to further concerns. Recommendations in the report included further training for the respondent's staff and disciplinary action (implicitly in respect of the claimant).

27. The claimant then raised a grievance against Mrs Farqurson essentially in respect of two matters: firstly her belief that Mrs Farqurson had wanted to escalate to a disciplinary hearing before she "should have done", given the claimant's understanding of the need to wait for the local authority safeguarding outcome; secondly the claimant had not been provided with an outcome from the second disciplinary hearing, as she had been led to expect would be given promptly.

28. The context for the claimant's grievance is that during this period the claimant has been instructed by the respondent not to contact Mr and Mrs A, respondent employees or anybody else, for obvious reasons, in connection with these matters. Two letters were sent to that effect, each slightly different in wording, but the gist was the same and the requirement for those kind of instructions was obvious, albeit the claimant's was upset by it and by her enforced estrangement from Mr and Mrs A.

29. Between 22 September and 18 October Mr Lawton, a trustee of the respondent and retired solicitor, become involved because it was fairly considered that Mrs Farqurson could no longer continue to conduct disciplinary proceedings, the grievance having been raised against her.

30. Mr Lawton met with Mrs Farquarson. Together they considered matters at great length, perusing an enormous amount of documentation which had been collated in response to the allegations against the claimant.

31. Mr Lawton then held a grievance meeting with the claimant, which Ms Tongue also attended, which at times became fractious. This was in part because Mr Lawton knew of, and was able to show to the claimant, the robust defence of the claimant's reputation that Mrs Farqurson had conducted by email on 2 August, only then to discover that the claimant had not been frank with her about Mr A's bank account when they had met. Mr Lawton drew an inference that far from being against the claimant or seeking to inconvenience her, Mrs Farquarson had demonstrated herself to be deeply loyal to the claimant at the outset of these events, and that the grievance was unfounded.

32. In any event, the grievance and meeting achieved very little by way of resolution, it strained the relationship between the claimant and the respondent further. Mr Lawton then concluded, in his words, that somebody "had to take a view". Without giving the claimant a chance to address a further disciplinary charge which had arisen out of the local authority report, he composed a lengthy letter in which he communicated the summary dismissal of her for a number of matters which I will come to in my conclusions. And there the employment ended. There was no appeal offered. As one of three trustees at the time Mr Lawton would ordinarily have participated in appeals.

33. I have needed to make made a number of further conclusions of fact of course. I have been well directed as to the law that I have to apply (both in relation to unfair dismissal (Section 98 of the Employment Rights Act 1998) and in relation to the common law of wrongful dismissal.

The Law

34. Unfair dismissal: the statutory provisions relevantly provide:

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--…

(b) relates to the conduct of the employee….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

35. It is for the respondent to establish the reason. The principal reason for a dismissal is comprised of the beliefs held and facts known which cause an employer to dismiss (**Abernethy v Mott, Hay and Anderson [1974] ICR 223 CA**.

36. Applying **British Home Stores Limited v Burchell [1990] ICR 303 EAT**, (acknowledging that the burden of proof is neutral) the Tribunal has to decide whether the respondent (in this case, Mr Lawton) held a genuine belief, based on reasonable grounds that the claimant had committed misconduct, after such investigation as was reasonable. Further, in all the circumstances whether the dismissal was within the band of reasonable responses and satisfies Section 98(4).

37. The “band of reasonable responses” test applies equally to any criticisms of the investigation and/or the procedural steps that were taken, in determining whether in the round the respondent acted reasonably and in accordance with equity and the substantial merits of the case in dismissing the claimant for the reason it has established.

38. The reasonableness of any investigation includes taking into account the gravity of the charge and the potential effect on the employee (see **Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522**); implicitly where the alleged conduct has career ending potential, that is a matter affecting the degree of investigation. (See also **Sainsbury's v Hitt [2002] EWCA Civ 1588**).

Wrongful dismissal

39. The respondent must prove that the claimant committed a repudiatory breach of contract, in response to which it was entitled to dismiss her summarily. Gross misconduct includes "a deliberate and wilful contradiction of the contractual terms, deliberate and wilful wrongdoing, or gross negligence (see paragraphs 111-113 of **Sandwell v West Birmingham Hospitals NHS Trust [2009] HHJ Hand QC**). See also (**Chhabra v West London Mental Health Trust [2012] EWHC 1735 QC** (upheld in the Supreme Court).

40. There is no rule of law defining the degree of misconduct which would justify dismissal (see Chitty on Contract [32nd Edition paras 40-184]). As above, wilful disobedience of a lawful and reasonable order is repudiatory conduct.

41. Further conduct or behaviour so inconsistent with the employment as to undermine the fundamental duty of trust and confidence is repudiatory conduct (**Neary v Dean of Westminster [1999] IRLR 288 at paragraph 22** per Lord Jauncy (Lord Jauncy acting as a Special Commissioner). (See also **Sinclair v Neighbour at para 287F**: "The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged as a manager"); and Adesokan v Sainsburys [2017] EWCA Civ 122 : paragraph 14 per Lord Justice Elias: "This refers to the term of trust and confidence which is implied in all contracts of employment. It is to the effect that neither party will, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence :see Malik v BCCI [1998] AC 20 p45 per Lord Steyn"

42. I also remind myself that in **Sandwell**, the appellant had argued that gross misconduct was not a fixed concept capable of precise definition and that the appellant Trust was entitled to regard failure to adhere to Trust policy as gross misconduct (the context for the remarks at paragraphs 111-113). See also paragraph 110 in which His Honour Judge Hand says this: "In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction of unfair dismissal or in the context of breach of contract". In **Sandwell** the appellant argued that conduct short of gross misconduct might still lead to a loss of trust and confidence.

Remedy

43. Section 122 of the Employment Rights Act 1996 as to the Basic Award relevantly provides:…(2) "Where the Tribunal considers that any conduct of the complainant before the dismissal….was such that it would be just and equitable to reduce of further reduce the amount of the basic award to any extent, the Tribunal shall reduce of further reduce that amount accordingly".

44. Section 123 as to the Compensatory Award relevantly provides: (1) "… the amount of the compensatory award shall be such amount as the tribunal

considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"; and "(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

45. The application of Section 123 (1) where the Tribunal has considered a dismissal unreasonable because of a failure in procedural steps was considered by Elias J (as he then was) at para 44 of **Software 2000 Ltd v Andrews** [2007] IRLR 568, when referring to the judgment of Buxton LJ in **Gover and Ors v Propertycare Ltd** [2006] EWCA Civ 286, [2006] 4 All ER 69, and the degree of assessment of "what would have happened". He said this:

> **"He also observed that the Polkey approach - assessing what would have happened had the dismissal been fair - was wholly consistent with the principle of assessing loss flowing from the dismissal on a just and equitable basis, which is the principle underlying section 123. These should be approached as "a matter for the common sense, practical experience and sense of justice of the Employment Tribunal sitting as an industrial jury" (para 14). He also approved the way in which HH Judge McMullen QC had described the process in the EAT in that case (para 26) where the judge had said that the Employment Tribunal's task was "to construct, from evidence not speculation, a framework which is a working hypothesis about what would have occurred had the [employer] behaved differently and fairly."**

Discussion and Conclusions

Unfair dismissal

46. The first issue that I have to consider is what was the principal reason for the claimant's dismissal. Did it relate to her conduct? Of course it did. That was fairly conceded.

47. The dismissal letter identified, in essence, three matters of alleged misconduct.

48. Firstly there was the conversation with Mrs Farqurson at the initial meeting - Mr Lawton considered that to be a deception on the part of the claimant in that she had not been frank about the bank account issue: she had not made full disclosure of it. That was a conclusion for which he had reasonable grounds on the undisputed chain of events, albeit the precise details of the verbal exchange with Mrs Farquarson was not fully explored for reasons that I will explain. The claimant provided her explanation of the exchange in her written response to that allegation.

49. The second matter to which he referred was sending a card to Mr and Mrs A in October, which had come to light by the time he reached his decision to dismiss the claimant. That read as follows:

"*To my lovely Betty and Allen*

I just wanted you both to know you're still in my thoughts, I miss you both so much, I've been told that you Allen are still enjoying your baths and I'm pleased about that. I do hope you're both ok and are being well supported. This nightmare will be over soon and then we can get back to normal. Hopefully by Christmas if you want I can start visiting you again.

Lots of love" and so on.

50. In the circumstances, like the claimant's text to Mr and Mrs B, that note was ill advised, albeit the emotion expressed in it may very well have been genuine and was in contrast to her angry reaction to Mr and Mrs B. The note subsequently came to the attention of the local authority and thereby to the attention of the respondent.

51. Thirdly, the claimant was alleged to have known of the need to report matters concerning client wellbeing to Mr Terry, having had those highlighted to her in 2014 and from the general day to day workings of the respondent. In not reporting her care for Mr and Mrs A, outside of hours, particularly when she knew that their situation, most pressingly that of Mr A, appeared to be deteriorating, she had failed in her professional duty to follow the instructions that had been given in 2014 (not to provide unregulated or uninsured care), it was said. The development in this charge was that the respondent did not, as it had done in framing an earlier charge, rely on an alleged verbal warning not to carry out uncontacted care in her own time (the claimant having fairly said in her written explanation there was no such warning given), but framed it as a failure to follow instructions.

52. These three matters, in the context of the overarching chain of events, were the facts and beliefs which caused Mr Lawton to dismiss. His letter said this: "The trustees consider that this deception [the conversation about the bank account with Mrs Farquarson] and the refusal to obey clear orders [the card and the care] both amount to gross misconduct and together amount to a loss of trust justifying summary dismissal". They comprised his principal reason for dismissal and his genuine belief about those matters is established.

53. I have to ask whether Mr Lawton had reasonable grounds for, and reached his conclusions after such investigation as was reasonable in all the circumstances, giving due weight to the Sainsburys v Hitt principle above.

54. In my judgment Mr Lawton did not have reasonable grounds for his belief after such investigation as was reasonable because the respondent did not carry out an investigation into the three main matters which comprised his reason for dismissal. This occurred partly because there was not an overlap with the charges put by Mrs Farquarson earlier in the process, and partly because of the expedited chain of events.

55. Mr Lawton did not, for example, seek his own explanation for the wholly new charge of "card sending" to Mr and Mrs A. This arose from the local authority's investigation. Perspectives on the card will of course, reasonably differ, but he did not seek an explanation, nor was there an investigation of the claimant's explanation for it.

56. Further there was no investigation of the claimant's explanations, as set out in her responses to Mrs Farqurson's charges, for the other two matters.

57. The fact that there was no investigation of those matters has become acutely clear in this Tribunal: the claimant's explanations have been explored only before the Tribunal, when one would have reasonably expected an investigation report or document annexing statements and so on of those involved, in order for a reasonable employer to take a decision to dismiss for those charges in these circumstances. That of course did not occur here.

58. An example is the claimant's explanation of the 2014 discussion, in which she said that she had told Mrs Farquarson that she was not taking clients out in her own time under the Age UK banner, as it was in her own time, and that she did not expect to be covered by Age UK insurance; she had also said it was in her nature to do this for people and if Age UK would not allow it "we have a problem". Mrs Farquarson was alleged to have said: if [you] do it again just don't tell [me]. Similarly Mr Terry was alleged to have joked with the claimant asking at Christmas 2015/2016 "how many clients [she] was visiting over Christmas and making dinner for". In essence the claimant's case was that it was well known that she was visiting and caring for clients in her own time. Mr Lawton recorded no statements or interviews with Mr Terry or Mrs Farquarson to understand if the claimant's assertions were correct. Instead he included in his dismissal letter detailed bullet points of the alleged 2014 instructions to the claimant, but none of the respondent witnesses could identify the source of those alleged instructions other than Mrs Farquarson's memory, which was an inherently unlikely sole source given the detail of the bullet points recorded.

59. Notwithstanding my general finding as to the lack of such investigation as was reasonable, I have found that Mr Lawton had reasonable grounds for his belief in misconduct arising from the first matter: deception, or certainly a lack of full truth, about the bank account issue, because that was discernible from the undisputed chain of events.

60. Instead of conducting an investigation into the other matters Mr Lawton "took a view". His evidence was that somebody had to do that, and that view was that the claimant could not return to work for the respondent, given everything that had gone on, and the destruction in trust that had arisen. He therefore summarily dismissed her without a hearing and without offering an appeal. That state of affairs is indicative of the fact that Mr Lawton had an entirely closed mind from his review of the papers with Mrs Farquarson, and his conduct of the grievance hearing, to the claimant's employment being able to continue in any shape or form, given the events that I have described.

61. I then have to ask myself in these circumstances, did the respondent act reasonably in treating Mr Lawton's belief in the claimant's misconduct as sufficient reason to dismiss, taking into account equity and the substantial merits of the case.

62. These circumstances are not exceptional. I agree with Mr Flood in that respect. Regrettably allegations of misconduct towards elderly and other vulnerable adults occur with regularity. Providers of such services routinely have to carry out investigations, collect statements, provide them to members of staff who may or may not be suspended, discuss those statements, consider the evidence, identify the alleged wrong doing with some precision (in order that employees understand exactly what it is they are alleged to have done), hold disciplinary hearings and provide the opportunity to appeal. In doing so employers, as this employer had done, typically adopt, and say that they adopt, disciplinary procedures applicable to their employees.

63. It is not within the band of reasonable responses to say that the local authority had investigated. That is particularly acute when the claimant was not dismissed for her conduct towards Mr and Mrs A, which was the subject of safeguarding investigation, but her conduct towards her employer in her early conversation with

Mrs Farquarson, and the allegation that she had not followed previous instructions.

64. This of course is a very small charity which, as I was told, had to keep the show on the road amongst these events and the strain they caused to other staff. That is also a context that I take into account. Nevertheless, in a caring organisation, which undoubtedly the respondent is, reasonableness requires it to treat staff, as well as clients, fairly and in accordance with its own procedures. Mr Lawton took a conscious decision not to undertake the steps reasonableness require: an investigation by the respondent of the disciplinary charges, a disciplinary hearing to discuss those charges and an opportunity to appeal. He did so for the reasons he explained. In my judgment those reasons are not sufficient to bring this dismissal within the band of reasonable dismissals. The unfair dismissal complaint succeeds: I consider that in all the circumstances the respondent acted outside the band of reasonable responses so doing in all the circumstances of this case.

Wrongful dismissal

65. As to the wrongful dismissal complaint I have to make my own findings about the underlying events. I have heard a lot more evidence than the respondent heard or considered in this matter, for the reasons explained above. I have also had that evidence challenged by accomplished advocates. Nevertheless the findings that I make have to be proportionate to the case I have in front of me. The Tribunal is sensitive to the fact that we have cases of this kind involving third parties who are not here, cannot comment and it is right that we limit our findings and avoid unnecessary ones in those circumstances.

66. I have to ask myself did the claimant engage in wilful, deliberate, serious misconduct? Did she engage in conduct objectively likely to destroy or seriously damage trust and confidence without reasonable or proper cause? Did she engage in gross negligence? If she did any of these things, and the respondent relies on conduct breaching the implied term, they amount to repudiatory conduct in response to which the respondent, as a matter of contract law, was entitled to treat the contract of employment at an end, as it did.

67. The destruction of trust and confidence of course can arise in a cumulative way, as a result of a number of different matters. In this case the loss of trust and confidence was expressed to have occurred, not because of the claimant's actions with Mr and Mrs A, necessarily about which I have made very brief findings, but because of her actions towards her employer. It is the contract of employment that is in issue in a wrongful dismissal case.

68. This was an employer which held the claimant in very high regard prior to these events. There was absolute trust in her, in her good nature and motives, as reflected in Mr Tedeschi's character statement. That was why she was taken at her word on 26 July and robustly defended by Mrs Farqurson. In those circumstances the higher the degree of trust, the greater the sense of betrayal; this case is partly about that.

69. The claimant's conduct in being economical with the truth on 26 July and in compounding that by sending an angry and rude text to Mr and Mrs B after that meeting was destructive of the trust and of the claimant's reputation. In mid October she communicated with Mr and Mrs A in the card, despite being told not

to do so, the sense of the instructions in two letters being absolutely clear. Furthermore she had not told her line manager of the extent of her involvement with Mr and Mrs A, which came to light in the draft letter to the GP, despite having that sort of problematic contact pointed out in the past by Mr Terry, such that the matters concerning Mr and Mrs A came out of the blue to the respondent.

70. As part of my findings, I nevertheless consider that Mrs Farquarson said in 2014 "if you do it again don't tell me about it" or words to that effect, referring to taking a client for a haircut in the claimant's own time.

71. I make that finding because Mrs Farquarson could not recall the comment having been made when it was put to her, but did not deny making it, unsurprisingly given the events were such a long time ago. The claimant was clear in her recollection. In my judgment it was an inherently likely comment at the time, not least because of the absolute trust that was there. Kindness to the vulnerable and elderly, and trust, were inherent in the way that everybody operated within the respondent. In 2014 the respondent believed of course that the claimant embodied those values. Had the claimant come clean about the matters concerning Mr and Mrs A earlier, then perhaps trust could have been maintained, but she did not, when there was every opportunity to do so after 26 July. Even if this was a "rabbit in headlights" moment, as Mr Flood described it, to which we may all have succumbed on occasions, there was every opportunity to put it right before matters deteriorated further. Her initial response, left uncorrected, came to make Mrs Farquarson look utterly foolish to the local authority.

72. These are my further findings and in my judgment the claimant's failure to be straightforward about the bank account, or to put that right promptly, and to observe the instructions about contact with Mr and Mrs A in the context of these events were without reasonable and proper cause, particularly when in this case the allegations and matters being discussed are so serious, and it was patently obvious that they were. That conduct was objectively likely to destroy trust and confidence. There was every reason to be full and frank from the outset and to tread very carefully.

73. For all these reasons I have concluded that these matters do amount to repudiatory conduct. The wrongful dismissal complaint fails.

Remedy

74. As to remedy both the advocates made submissions about the way in which that should be addressed and were agreed about the underlying schedule of loss figures (the calculation of the basic award and the amount of net weekly pay). They were not necessarily agreed about whether the effect of a "polkey" deduction and/or blameworthy conduct amounted to the same. Rather than list further time to explore that at 16.40pm on a Friday it is absolutely right that the parties go away with a full conclusion to this case. It will be apparent from what I have said that I do consider the claimant's conduct blameworthy in the sense that the claimant was responsible for her cumulative repudiatory conduct and it contributed to her dismissal.

75. I step back from saying that she engaged in a deliberate and wilful deception in relation to the discussion with Mrs Farquarson, but I say that having heard the claimant giving her evidence, and having been challenged upon it. I consider it to have been a "rabbit in headlights" moment.

76. I do so weighing in the mix, in contrast to her evidence before me, her contemporaneous responses at the time to the disciplinary charges, which were neither apologetic nor insightful into the effect of her conduct on others. In fact they appeared not to recognise any wrong at all, and they relied on the semantics of the matters rather than the substance. They also reflected a deep anger at the intrusion and the possible effect on the relationship and contact with Mr and Mrs A, whom the claimant described as an elderly couple who had become to her like the parents she was without.

77. I weigh all that when I come to the conclusion that her cumulative conduct towards her employer was blameworthy, and led to her dismissal.

78. In order to apply the Polkey principle in this case, of course, which is the first assessment under Section 123 (1), I am asked to consider what might have happened had the procedural steps which were not undertaken, been undertaken.

79. On the balance of probabilities and I have reached the conclusion that had contact been kept with the claimant to continue disciplinary charges following the local authority report around about 22 September, and had a reasonable disciplinary investigation of the charges for the matters for which she was to be dismissed, taken place after 22 September without unreasonable delay, the Claimant may not have sent the card to the client as she did. I accept that there was a volume of material and correspondence to be addressed, and the size and resources of this employer were limited.

80. I have therefore considered what would have happened had the claimant been given the full opportunity of an investigation by her employer, which would have been reasonable in this case. I have to assume that the investigation would have been done by a reasonable employer, that is, someone without a closed mind. Instead of “taking a view” and dismissing on 18 October, what would have happened had the respondent’s disciplinary procedure been applied.

81. I take into account that the local authority report would not have changed in that time. The grievance had turned out to be an unfortunate distraction about which the parties corresponded but it was rightly rejected.

82. In my judgment the claimant would have been reasonably dismissed following a fair procedure, by a fair minded and reasonable employer acting within the band of reasonable responses, and giving due weight to the complexity of the matters being discussed, within six weeks. That is the limit of her lost earnings arising from the actions of the respondent in dismissing her summarily when it did.

83. I am conscious of the submission to the effect that a deduction for contributory fault, and my Polkey assessment overlap, but I also bear in mind the overarching just and equitable framework in the statutory language.

84. The Tribunal awards the claimant a basic award of £2,346. I do not reduce it by reason of the claimant’s conduct before the dismissal because I do not consider it just and equitable to do so for the reasons explained below.

85. A further issue is whether there should be any uplift to deal with an unreasonable failure to comply with the ACAS code, which the omission of the various procedural steps in this case demonstrated. Mr Lawton’s evidence was that the departure from procedural steps was a case of taking a view, knowing about the

provisions of the ACAS code, but because of press reporting of this sector and that the charity could not afford to employ an individual against whom the local authority had partially upheld a safeguarding allegation, he did not apply them.

86. In my judgment those are not reasonable reasons to abandon either the procedures espoused by the respondent or the ACAS code which they reflected. The issue is the extent of the uplift. I bear in mind of course that this is a small charity, but it was a wholesale failure communicating summary dismissal without the opportunity to answer the charges in a hearing or to have information which had been provided investigated. On that basis I uplift the compensatory award by 20%.

87. The reasons that I do not consider it just and equitable to reduce the basic award for conduct, and that I assess the just and equitable proportion to reduce the compensatory award as zero, include the reasons for uplifting the award for an unreasonable failure to follow the ACAS code above. Mr Lawton is a retired solicitor whose evidence to the Tribunal was entirely straightforward and honest; he acted with pragmatism to address the position of the respondent charity knowing that he was not applying its disciplinary procedures as the claimant might reasonably have expected. It is not in the interests of justice and the rule of law if, in upholding the claimant's right not to be unfairly dismissed, which includes the application of a reasonable procedure in all but extreme cases, I apply a conduct reduction to either element of the award in all the circumstances of this case.

88. I also need to deal with the reimbursement of Tribunal fees. My usual practice would be to award the claimant both the issue fee and the hearing fee albeit there were two complaints and albeit that one has not succeeded, but it strikes me as just in this case, given the circumstances of the unfair dismissal, and that there would have been a hearing in any event, that £1200 by way of reimbursement of fees is the appropriate sum.

Employment Judge JM Wade

Date 3 August 2017